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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE BROOKS SHOCKLEY,

Defendant and Appellant.

F048878

(Super. Ct. No. SC076676A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Stephen P. Gildner, Judge.

Jackie Menaster, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Cornell, J., and Kane, J.

In April 1999, appellant Andre Shockley pled guilty to spousal battery (Pen. Code, § 273.5, subd. (a)). In May 1999, the court suspended imposition of sentence and placed appellant on five years' probation. In April 2004, the court summarily revoked appellant's probation, based on, inter alia, an allegation that appellant had been arrested for spousal battery. In November 2004, appellant pled no contest to misdemeanor spousal battery. In January 2005, appellant was arraigned on the probation violation. In March 2005, appellant moved to dismiss the probation revocation proceedings on grounds that he had been denied his constitutional rights to due process of law and a speedy hearing on the alleged violation of probation. The court denied the motion and, in August 2005, following a probation revocation hearing, found that appellant had violated his probation by committing a new offense. In September 2005, the court imposed a two-year prison term. The instant appeal followed.

On appeal, appellant contends the court erred in denying his motion to dismiss probation revocation proceedings (motion to dismiss). He argues that because over eight months elapsed between the summary revocation of his probation and his arraignment on the probation violation, his rights under the California and United States Constitutions to a speedy probation revocation hearing were violated. We will affirm.

PROCEDURAL BACKGROUND

As indicated above, appellant was placed on five years' probation in May 1999, following his conviction of spousal battery. On April 29, 2004,[1] with less than one month remaining in appellant's five-year probationary period, Kern County Deputy Probation Officer Nicolas Gonzales executed a "DECLARATION LETTER," stating that on April 13, appellant was arrested for, inter alia, spousal battery. This letter was filed

[1] Except as otherwise indicated, further references to dates of events are to dates in 2004.

with the court on April 22, and that day the court issued an order summarily revoking appellant's probation and issuing a bench warrant.

On November 2, appellant pled no contest to a charge of misdemeanor spousal battery.

Appellant states in his memorandum of points and authorities in support of his motion to dismiss that he was arrested on December 28, at which time he was "advised of the revocation for the fi[r]st time." On January 11, 2005, appellant was arraigned on the probation violation. On February 14, 2005, appellant filed his notice of motion to dismiss. The hearing on the motion was held over two days in March 2005.

In his declaration letter, Officer Gonzales indicated that as of April 19, appellant was in custody in the Fresno County jail. At the March 2005 hearing, Gonzales testified to the following. Appellant was released from custody on April 28. Gonzales knew appellant's home address, his home telephone number and the address of his place of employment as indicated on the monthly reports appellant had been providing during the nearly five years of his probationary period, but Gonzales neither telephoned appellant nor sent him a copy of the declaration letter. Gonzales "took no action to arrest [appellant]," and "took no steps to notify [appellant] of the revocation proceedings other than filing [the declaration] letter and having a bench warrant issued . . . ." Appellant filed his final monthly report in May 2004, after the bench warrant had issued.

Gonzales further testified that he learned appellant had been arrested when he received a telephone call from Darlyne Shockley (Darlyne), appellant's wife. Darlyne testified to the following. Within approximately two days of appellant's April 2004 arrest, at appellant's request she telephoned Gonzales. During that telephone conversation, Darlyne asked "whether any action was going to be taken" against appellant. Gonzales "told [Darlyne] that . . . nothing was going to be done. . . ." Gonzales stated "[appellant had been] doing well the four years that he was on probation

and so close to the end that he didn't feel that it was necessary to . . . to violate him." Thereafter, within the next two days, Darlyne relayed this information to appellant.

Gonzales testified that he did not represent to appellant "or any member of [appellant's] family" that he (Gonzales) "would not be filing a probation violation declaration . . . ."

Appellant submitted a declaration in support of his motion to dismiss in which he stated the following. At dinner on April 12, Darlyne "drank approximately eight or nine mixed drinks." While appellant was driving himself and Darlyne home from dinner, Darlyne saw two "kids" walking by the road. She wanted to give them a ride, and when appellant told her there was no room for them in the "two-seater" car, Darlyne "became very insistent, grabbed the steering wheel and tired to pull the car off the road . . . ." At that point, appellant, in an effort to avoid losing control of the car, "swung [his] arm, not to injure her, but only to push her away . . . ."

Appellant further declared: "The delay has also prejudiced me in defending against the alleged violation of probation because I settled my case in Fresno County for misdemeanor probation and community service, without any knowledge of the revocation proceeding. If I had known that this proceeding was pending, I would have insisted on proving my innocence to the Fresno charges at trial."

As indicated above, the court denied appellant's motion, and subsequently found appellant in violation of probation and imposed a prison sentence on the underlying offense.

DISCUSSION

As indicated above, over eight months elapsed between the probation department's initial determination that appellant had violated probation and his arraignment on the probation violation. Appellant argues that a result of this delay in the probation revocation proceedings and the government's failure to notify him of the

summary revocation, he was denied his rights under the United States and California Constitutions "to a speedy hearing on his probation violation . . . ."

"The state and federal Constitutions both guarantee criminal defendants the right to a speedy trial (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1), and both guarantees operate in state criminal prosecutions . . . ." (*People v. Martinez* (2000) 22 Cal.4th 750, 754.) We assume without deciding, as both parties assert, that these constitutional speedy trial guarantees apply to claims of delay in holding a probation revocation hearing. (*People v. Young* (1991) 228 Cal.App.3d 171 [where failure to give incarcerated probationer notice of probation revocation proceedings resulted in deprivation of opportunity to request that sentence on offense underlying probation violation run concurrently with that on offense for which probationer was incarcerated at time of probation violation, court erred in failing to hold evidentiary hearing on whether lack of notice violated Sixth Amendment-based speedy trial guarantee].)

The court's ruling on appellant's motion to dismiss involves questions of both fact and law. We review factual findings under the substantial evidence standard. (*People v. Cromer* (2001) 24 Cal.4th 889, 894 ["[t]raditionally, . . . an appellate court reviews findings of fact under . . . substantial evidence [standard].)" Thus, "[W]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence." (Cf. *People v. Glaser* (1995) 11 Cal.4th 354, 362 [on review of motion to suppress evidence, substantial evidence standard applies to court's express and implied factual findings].) Under this standard, all presumptions favor proper exercise of that power to judge the credibility of witnesses, resolve conflicts, weigh evidence, and draw factual inferences. (*People v. James* (1977) 19 Cal.3d 99, 107.) In reviewing the application of facts found to the legal question of whether appellant was denied his right to speedy trial, the standard of review is de novo. (*People v. Cromer*, *supra*, 24 Cal.4th at p. 894, [standard of review for "determinations of law . . . is independent or de novo review"]; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 [" ' " '[i]f . . . the question requires us to

consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, . . . the question should be classified as one of law and reviewed de novo' " ' "].)

We first consider appellant's federal constitutional claim. The United States Supreme Court, in *Barker v. Wingo* (1972) 407 U.S. 514 [92 S.Ct. 2182] (*Barker*) articulated four factors that must be balanced in a speedy trial analysis. These factors are (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant. (*Id.* at p. 520; accord, *Doggett v. United States* (1992) 505 U.S. 647, 651 [112 S.Ct. 2686] (*Doggett*) [restating and applying the four-factor test announced in *Barker*].) No one factor constitutes a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." (*Barker, supra*, 407 U.S. at p. 533.) "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." (*Ibid*.)

With respect to the first of the *Barker*/*Doggett* factors, we must distinguish "ordinary" delay and delay that is " 'presumptively prejudicial' . . . ." (*Doggett*, *supra*, 507 U.S. at p. 652.) Delay falling in the latter category is that which exceeds "customary promptness." (*Ibid.*) And if that standard is met, "the presumption that . . . delay has prejudiced the accused intensifies over time." (*Ibid.*) The term . . . " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the <u>*Barker*</u> enquiry [into the remaining relevant factors]." (*Id*. at p. 652, fn. 1.) Appellant contends, and we assume without deciding, that the delay of more than eight months in the instant case was " 'presumptively prejudicial' . . . ." (*Id*. at p. 652.)

With respect to the second factor, we look to "whether the government or the criminal defendant is more to blame for the delay . . . ." (*Doggett*, supra, 505 U.S. at p. 651.) "[D]ifferent weights should be assigned to different reasons. A deliberate attempt

to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence . . . should be weighted less heavily but nevertheless should be considered . . . ." (*Barker, supra,* 407 U.S. at p. 531.) Here, although there is no indication of deliberate delay, the People offer no excuse for either the failure to notify appellant of the probation revocation or the delay in arraigning appellant on the probation violation. And with respect to the third factor, there is no dispute appellant acted promptly to assert his right to speedy hearing once he became aware that the People were proceeding with revocation of probation. Thus, the first three factors militate, in varying degrees, in favor of appellant.

We turn now to the prejudice component of our inquiry. As indicated above, the court found appellant violated his probation based on appellant's 2004 conviction of spousal battery, a conviction based on appellant's no contest plea. Appellant argues that his plea notwithstanding, he was not guilty of that offense and that his "uncontested affidavit" established that "had [he] known that a probation violation proceeding was pending, he would have insisted on proving his innocence in [the 2004 spousal battery] case," rather than pleading no contest to the offense. Therefore, appellant contends, he suffered "actual and substantial prejudice" because had the government not delayed for over eight months in making him aware of the pending probation revocation, he would not have suffered the conviction that led to the finding that he violated his probation. There is no merit to this contention

The court was not compelled to accept appellant's self-serving claim that he would not have pled guilty to the offense which constituted his probation violation had he known the probation revocation was pending. On this point we find instructive the principle that when a criminal defendant who has pled guilty later seeks to withdraw that plea on the grounds that he or she did not understand the plea or its consequences, "in determining the facts, the trial court is not bound by uncontradicted statements of the defendant." (*People* v. *Hunt* (1985) 174 Cal.App.3d 95, 103.) Similarly, in the instant

case the court reasonably could have refused to credit appellant's claim, notwithstanding that it was "uncontested." The court reasonably could have concluded further that appellant pled no contest because he was guilty of the charged offense, and that appellant would not have taken the matter to trial even if he had known he was subject to the revocation of probation**. (***People v. Hill* (1984) 37 Cal.3d 491, 499 [prejudice, for purposes of analysis of claim of violation of federal constitutional speedy trial right, "is a factual question to be determined by the trial court"].) Under the principles of appellate review of factual findings discussed above, we presume the court did so conclude and we uphold that finding.

We turn now to the balancing required under *Barker* and *Doggett*. There is no dispute the delay of over eight months was the fault of the government, but there is no indication the government made a deliberate attempt to hamper the defense; appellant acted promptly in asserting his right to a speedy hearing; and, as demonstrated above, the court's implied finding of no prejudice is supported by substantial evidence. After balancing all four factors, we conclude there was no violation of appellant's Sixth Amendment speedy trial right. (Cf. *U.S. v. Jones* (2d Cir. 1996) 91 F.3d 5, 9 [reversing district court's finding of a Sixth Amendment speedy trial violation on the basis of 12 months of government negligence without "some additional compelling circumstance, such as bad faith by the prosecution or actual prejudice"].)

Given the foregoing, appellant's California Constitution-based argument need not detain us long. Unlike a defendant raising a Sixth Amendment speedy trial claim, a defendant seeking to establish a violation of his right to a speedy trial under the California Constitution "must affirmatively demonstrate prejudice." (*People v. Martinez*, *supra*, 22 Cal.4th at p. 755.) As demonstrated above, appellant has not done so.

DISPOSITION

The judgment is affirmed.